88-1392 (1)

Supreme Court, U.S.
FILED
JAN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

THE SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1988

NO.:_____

RAPHAEL SOSA UGALDE

PETITIONER,

VS.

STATE OF GEORGIA

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO

THE GEORGIA STATE COURT OF APPEALS

PEARL L. HENRY, ESQUIRE

2255 TROUTDALE DRIVE

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FREDERICK R. J. JACKSON, ESQUIRE

ATTORNEY FOR PETITIONER AND OF COUNSEL

QUESTIONS PRESENTED

(1) Is there a compelling reason to grant Certiorari because of the direct and substantial conflict between the ruling by the Georgia Court of Appeals in the case at bar and its ruling in State v. McGee 173 Ga. App. 287 and Pullano v. State 169 Ga. App. 377?

(2) Did the November 5, 1987 detention, search and seizure of Petitioner violate his rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, similar provisions of the Georgia Constitution Article I, Section I, Paragraphs II and XIII and O.C.G.A. 17-5-1 and 17-4-20?

(3) Was the Order of the lower Court based on incorrect principles of the law and did said Order imply that a valid consent was given?

QUESTIONS PRESENTED

(4) Are the facts of the present case sufficiently distinguished from the facts of Scott v. State 170 Ga. App.409 and 253 Ga. 147 so as to make the law of that case inapplicable to the present case?

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UNITED STATES CONSTITUTION

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GEORGIA CONSTITUTION ARTICLE I, SECTION I, PARAGRAPHS II AND XIII

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17-5-30, 17-5-1, 17-4-20

CASES

EDWARDS V. ARIZONA, 451 U.S. 479

GRANT V. STATE, 152 GA. APP. 258

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SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218

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UNITED STATES V. ROGERS, 436 F. SUPP. I

IN THE SUPREME COURT

OF

THE UNITED STATES

RAPHAEL SOSA UGALDE

PETITIONER

VS.

THE STATE OF GEORGIA

RESPONDENT.

PETITION FOR A WRIT OF

CERTIORARI TO THE GEORGIA

COURT OF APPEALS

The Petitioner, Defendant respectfully prays that a Writ of Certiorari issue to review the opinion of the judgment of the Georgia Court of Appeals entered in the above case on September 9, 1988. A Motion for Rehearing was denied September 28, 1988.

Petitioner petitioned the Supreme Court of Georgia for a Writ of Certiorari which was denied November 9, 1988 and a Motion for the Reconsideration of the same was denied November 30, 1988.

OPINIONS BELOW

The opinion of the Trial Court is unreported, but a copy thereof is attached hereto as APPENDIX "A". The Opinion of the Court of Appeals is reported at 188 Ga. App. 592; a copy of that opinion and a copy of each notice of denial is presented in APPENDIX "B".

JURISDICTION

The Georgia Supreme Court denied Petitioner's Motion for Reconsideration of his Petition for a Writ of Certiorari on November 30, 1988. This Petition to the United States Supreme Court for a Writ of Certiorari is filed within sixty (60) days of that date. Jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, Article I, Section I, Paragraphs II and XIII of the Georgia Constitution provisions of the Official Code of Georgia 17-5-30(1), 17-5-1, 17-4-20 are set forth in APPENDIX "C".

STATEMENT OF THE CASE

Petitioner was stopped November 5, 1987 at the Atlanta Georgia Hartsfield International Airport after flying into the city from Miami, Florida, a known drug source city. Mr. Ugalde was enroute to Knoxville, Tennessee(T12). He was detained, searched and arrested; Mr. Ugalde was subsequently indicted for trafficking in more than 28 grams of a mixture with a purity of more than 10% cocaine(R4,5). The Defendant,

Petitioner, filed a Motion to suppress the evidence on the grounds that the stop was without probable cause. Therefore, the search and arrest were illegal. During the hearing to suppress, the officer testified that prior to the search, he had no reason to suspect Mr. Ugalde of any criminal activity other than the fact that he flew in from a drug source city(T32,33,38,40). He also admitted that Petitioner Ugalde met the identification test during the initial encounter when his drivers license and ticket matched (T19,20,22).

There is a conflict in the testimony regarding the issue of consent. Ugalde testified that he did not give consent. The officer testified that when he asked for Ugalde's permission to conduct the search, Ugalde asked to speak with an attorney first (T24,25). He and two other officers took Ugalde to a room at the airport so he could

use the telephone and they could conduct the search if a consent was given. Officer Dallas, the arresting Officer, admitted he and one of the officers told Petitioner several times that he did not need to speak with his attorney before giving his consent to be searched (T 25,26,33,39,41,42,45). The Officer testified that Ugalde was still looking for the telephone number when the search began (T 42,45). He contended however that Petitioner Ugalde gave his consent prior to the search. The Judge in the lower Court ruled to suppress the evidence on the grounds that all police initiated contact should have ceased when Defendant asked for an attorney. However, the Judge stated in his Order that he believed the facts to be substantially as testified to by the Officer.

Defendant argued that such ruling implies that the Judge believes that a verbal assent was given but did not equate such assent with a valid consent within the context of Schneckloth v. Bustamonte, supra.

Defendant's argument is based on the fact that the Judge would have no basis for ruling that police initiated contact should have ceased since a search by valid consent may occur under any circumstances (See Defendant's Brief and Motion for Rehearing).

The ruling by the lower Court was reversed by the Court of Appeals on the grounds that the ruling was based on incorrect principles of law. The Court of Appeals based its decision that consent was given on the fact that the lower Court also basically believed the Officer. That Court also cites Scott v. State 170 Ga. App. 409 and 253 Ga. 147 in support of its contention. (See the Court of Appeals Order Appendix "B".) Defendant applied for a Rehearing; the Rehearing was denied September 28, 1988. A final Order denying Certiorari was entered by the Georgia Supreme Court November 30, 1988; Defendant has not gone to trial.

REASON FOR GRANTING THE WRIT

The Court of Appeals erred in reversing the Order of the lower Court as to consent and probable cause. This error may be due to the fact that the law as to what constitutes probable cause for stop and search under the "Drug Courier Profile" and what constitutes valid consent in such cases is very unsettled. This case centers around both.

THERE IS SUBSTANTIAL CONFLICT BETWEEN THE GEORGIA COURT OF APPEALS RULING IN THE PRESENT CASE AND ITS RULING IN PRIOR SIMILAR CASES

The judgment of the Court of Appeals against Petitioner conflicts with its ruling in two prior cases having similar fact patterns. See State v. McGee, supra and Pullano v. State, supra.

In the case of McGee, supra, where the arresting officer had no reason to suspect the defendant of criminal activity until after the search was made, the Court of Appeals found the search to be illegal in spite of the fact that the officer claimed the defendant agreed to the search. The case of Pullano, supra, has a fact pattern almost identical to the case at bar. The Court of Appeals ruled that after Pullano met the identification test, his detention should have ended. That Court also concluded that since Pullano asked for an attorney, it was evident thereby that he did not give his consent to be searched. However, the Court of Appeals did not view Petitioner Ugalde's request for an attorney as evidence of his refusal to give consent.

THE DETENTION, SEARCH AND ARREST OF DEFENDANT WAS IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE LAWS OF THE STATE OF GEORGIA

Mr. Ugalde contends that the search and arrest were made without probable cause and therefore, in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution and similar provisions under the Constitution of the State of Georgia. See also, State v. Watts 154 Ga. App. 789 and Grant v. State 152 Ga. App. 258.

At the hearing on defendant's Motion to Suppress, the arresting officer, State's witness, testified that when he approached and detained Defendant, his only basis for the detention was the fact that defendant was traveling alone and from a known drug source

city(T32,33,38,40). This type of random detention based on less than articulable suspicion has been held to be illegal and in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Reed v. Georgia 448 U.S. 438, United States v. Rogers 436 F.Supp. 1. This type of search has also been found to be in violation of Georgia law, Georgia Constitution, Article I, Section I, Paragraph XIII, O.C.G.A 17-5-1, State v. McGee 173 Ga. App 287, Pullano v. State 169 Ga. App. 377.

The officer also stated in his testimony that prior to the search of Defendant and Defendant's bag, he had no reason to suspect Defendant of criminal activity(T33,40,43).

Defendant had committed no crime known to the officer prior to the search, O.C.G.A 17-5-20. Georgia Court have held that a search under such conditions is illegal and evidence obtained therefrom is not admissible at any trial to support charges resulting from

the illegal search, Grant v. State 152 Ga. App. 258, O.C.G.A. 17-5-1, O.C.G.A. 17-5-30.

The fact that Defendant had arrived at the airport from what is referred to in "the drug courier profile" as a drug source city, does not give rise to the level of articulable suspicion, Scott v. McGee 173 Ga. App. 287, and Reed v. Georgia 448 U.S. 438, United States v. Rigers, 436 F. Supp.1. The arrest of Defendant resulting from the unlawful search is illegal and all evidence obtained therefrom is inadmissible. Grant v. State 152 Ga. App. 258, Harper v. State 135 Ga. App. 924, O.C.G.A. §17-5-30, State v. McGee 173 Ga. App. 147.

THE ORDER OF THE LOWER COURT DID NOT IMPLY THAT A VALID CONSENT WAS GIVEN

The Court of Appeals cites in its opinion at page 4, Appendix "B" that Defendant Ugalde gave his consent to the search and uses the lower Court's statement in its order on credibility of the officer as support for its finding(R33,34).

The lower Court's order, interpreted by the Court of Appeals to imply a belief that verbal assent had been given, does not appear, as stated to equate this assent with a valid consent within the context of the totality of circumstances test enunciated in Schneckloth v. Bustamonte, supra.

Such factors as age and education of the accused, lack of advise to the accused regarding this constitutional rights, prolonged questioning and other subtle coercive factors in the environment are factors to consider in determining the validity of a consent. See also United States v. Rogers, 436 F. Supp. 1. The Order of the lower Court which states that all police initiated contact should have ceased when Defendant asked for an attorney, supports Defendant's contention that no valid consent was given. Had the Court believed that a valid consent was given, there would not have been justification to rule that all contact should have ceased.

In addition, Ugalde, Defendant contends that the environment was extremely coercive and amounted to custody within the context of Terry v. Ohio, 392 U.S. 1 and Edwards v. Arizona 451 U.S. 479.

THE FACTS OF THE PRESENT CASE ARE SUFFICIENTLY DISTINGUISHED FROM THE FACTS OF SCOTT V. STATE, 170 GA. APP. 409 AND SCOTT V. STATE, 253 GA. 147, SO AS TO MAKE THE LAW OF SAID CASES INAPPLICABLE TO THE PRESENT CASE.

The Court of Appeals cites Scott, supra. as legal basis for its determination that consent was given in the case at bar. The case of Scott differs significantly from the case at bar in that the environment in that case was not coercive as the environment in the present case where three officers were present during the detention and search of the Defendant(T25,33, 41,42,45), as opposed to the presence of one officer in Scott supra. The case also differs because Scott abandoned his attempt to contact

an attorney on his own accord. Petitioner in the present case was persuaded by the arresting officers not follow through with his attempt to contact an attorney. Scott was given information regarding his right to refuse to allow the search, Petitioner was given no information regarding his right to refuse to give consent to the search(T45). See Reed v. Georgia, 448 U.S. 438, and State v. Reid, 247 Ga. 445(449).

CONCLUSION

For the reasons stated, Petitioner prays that his application for a Writ of Certiorari be granted.

This _____ day of January, 1989.

Submitted By:

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APPENDIX "A"

IN THE SUPERIOR COURT FOR THE

COUNTY OF CLAYTON

STATE OF GEORGIA

STATE OF GEORGIA *

VS. * CASE # 87CR-6227-3

RAPHAEL SOSA UGALDE *

ORDER

The Court originally issued on January 25, 1988, its Order granting Defendant's Motion to Suppress. On request of the State, the Court issues this Order amending its original Order to state more specifically the Court's decision in the matter.

The Order of January 25, 1988 is hereby amended as follows:

"The Court's decision on the Defendant's Motion to Suppress does not turn upon issues of facts or credibility of the witnesses but upon a narrow legal issue. The Court finds that the testimony of DEA Agent Dallas are substantially the facts as they actually occurred in this case. The Court finds that

when Agent Dallas was aprised by the Defendant that he wanted to talk to an attorney before any search or questioning continued, that any other interrogation, search or custodial form of investigation initiated by the law enforcement should have ceased. The Court finds that when a Defendant has invoked the privilege of wanting to talk to a lawyer before the police do anything else, this changes the involvement of the police with the Defendant. Law enforcement officials, not the Defendant, having initiated questions to the Defendant following his statement, renders the subsequent search and seizure of the contraband, unlawful and in violation of his constitutional rights, both United States and Georgia.

For the above stated reasons the Defendant's Motion to Suppress is hereby granted."

SO ORDERED, this 11th day of February, 1988, Nunc Pro Tunc.

STEPHEN E. BOSWELL,
JUDGE, SUPERIOR COURT
CLAYTON JUDICIAL CIRCUIT

APPENDIX "B"

Deen, P.J.

Carley & Sognier, JJ.

In The Court of Appeals of Georgia

76867. THE STATE V. UGALDE. S-121

SOGNIER, JUDGE.

The trial court granted Rafael Sosa Ugalde's motion to suppress evidence seized at the time of his arrest, and the State appeals.

Evidence adduced at the hearing on the motion to suppress reveals that Joseph Dallas, a Federal agent on duty at the Atlanta airport, observed appellee walking up the concourse with a tote bag away from the gate where the flight from Fort Lauderdale, a known drug source city, had just landed. He determined that appellee stopped at another gate to ask for directions for his connecting flight to Knoxville; that only one person, a Rafael Ugalde, was traveling alone from Fort Lauderdale to Knoxville; that passenger Ugalde had paid cash for his ticket the previous

night; and that he had a false callback number with the airline. Based on the information, which matched elements of the drug courier profile, Dallas, who was dressed in casual clothes ~~and~~ carrying a concealed weapon, approached appellee at the Knoxville departure gate. Dallas ascertained from appellee that his ticket was issued in the same name as his driver's license, Rafael Ugalde, and that he had no baggage tickets. Dallas also testified that appellee's "hands were kind of shaking". Fellow narcotics agents Paul Markonii and Rick Jordan, upon joining the conversation between Dallas and appellee, suggested that they move to the edge of the seating area, which appellee agreed to do. Informing appellee that they were looking for narcotics, the agents asked if he would agree to a search of him and his tote bag, to which appellee responded that he wanted to call his attorney first. Appellee agreed to accompany the agents to an airline office two gates away to make his call, but when he reached the office he was unable to find his attorney's

phone number in his bag. Markonni then stated that appellee did not need to consult with counsel to consent to a search, and again requested permission to search, to which appellee responded, "[g]o ahead, do it". The search yielded seven containers of what appeared to be cocaine in his pocket and tote bag.

The trial court determined that the search and seizure were illegal and because once appelle requested counsel, all further interrogation and investigation should have ceased. Appellee argue that the search was consensual, and that the Fifth Amendment privilege against self-incrimination was not applicable.

We agreed with appellant that the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination articulated in Miranda v. Arizona, 384 U.S. 436(86 SC 1602, 16LE2d 694) (1966), which is based upon the theory that custodial interrogation is inherently coercive, see Kirby v. Illinois, 406 U.S. 682, 688(92 SC 1877 2d282) (1984), aff'd, 253 Ga. 147(317 SE2d 830), involving a similar factual situation.

The trial court apparently focused on the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments, but the right "attaches only at or after the time that adversary judicial proceedings have been initiated against [appellee]. [Cits.]" Kirby, supra. Because appellee had not been indicted, arraigned, or otherwise subjected to the commencement of criminal proceedings against him, the trial court erred by concluding that his constitutional right to counsel had been invoked before the search. See id. at 688-690; see also Scott, supra at 411(2) .

Nonetheless, appellee contends that the motion to suppress was properly granted because he did not voluntarily accompany the agents or consent to search. Appellee testified that he did not want to leave the departure gate with the agents, but he felt he "had to go with them". However, Agent Dallas testified that at all times he and his fellow agents did nothing to indicate that they would have pursued him if he had refused to cooperate. Dallas also testified that appellee agreed to allow a search of his

person and bag. Because there was direct conflic in the testimony on this issue, the question below turned on the credibility of the witnesses. The trial court found that Dallas' testimony presented "substantially the facts as they actually occurred," and we do not find this decision clearly erroneous. See Woodruff v. State, 233 Ga. 840, 844(3) (213 SE2d 689) (1975). Thus, the trial court's grant of the motion to suppress being based on an invalid legal theory, see generally State v. Hortman, 185 Ga. App. 756, 757-758 (2) (365 SE2d 887) (1988), and the trial court's finding of fact not otherwise requiring the grant of the motion, we therefore reverse the trial court's grant of appellee's motion to suppress the seized evidence.

Judgement reversed. Deen, P.J., and Carley, J. concur.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Nov. 09 1988

Case No. 46305, Raphael Sosa Ugalde v. The State

C/A # 76867

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, Weltner & Bell, JJ, Dissent.

Very truly yours

JOLINE B.WILLIAMS, Clerk

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Nov. 30 1988

The motion for rehearing was denied today:

Case No. 46305, Ugalde v. The State

Smith, Weltner & Bell JJ. dissent.

Yours very truly

MRS. JOLINE B. WILLIAMS,

Clerk.

APPENDIX "C"

FOURTH AMENDMENT

CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

FIFTH AMENDMENT

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private be taken for public use, without compensation.

FOURTEENTH AMENDMENT

CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property within its jurisdiction the equal protection of the law.

GEORGIA CONSTITUTION

ARTICLE 1, SECTION 1

PARAGRAPH 11: Protection to persons property; equal protection

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the law.

APPENDIX "C"

GEORGIA CONSTITUTION

ARTICLE 1, SECTION 1

PARAGRAPH X111: Searches, Seizures and Warrants

The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the person or things to be seized.

MOTION TO SUPPRESS EVIDENCE

ILLEGALLY SEIZED GENERALLY

O.C.G.A. § 17-5-30(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of the property, the possession of which is not otherwise unlawful and to suppress as evidence anything so obtained on the grounds that the search and seizure without a warrant was illegal.

ARTICLE 1

SEARCH WITHOUT WARRANTS

17-5-1 Search pursuant to lawful arrest authorized.

(a) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering or seizing the fruits of the crime for which the person has been arrested; or

(4) Discovering or seizing any instruments, articles, or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.

ARREST OF PERSONS

O.C.G.A. § 17-4-20 (a) An arrest for a crime may be made by a law enforcement officer either under a warrant or without a warrant if the offense is committed in his presence or within his immediate knowledge, if the offender is endeavoring to escape, if the officer has probable cause to believe that an act of family violence, as defined in Code § 19-13-1, has been committed, or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant.

IN THE SUPREME COURT OF THE

UNTIED STATES

RAPHEL SOSA UGALDE

PETITIONER

vs.

STATE OF GEORGIA

RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that we the undersigned this day served upon the opposing parties listed below the within and foregoing Petition for a Writ of Certiorari to the Georgia Court of Appeals by mailing three (3) copies thereof postage paid to:

1) Clifford Stitcher
Assistant District Attorney
Clayton County
Clayton County Court House
Jonesboro, Georgia

2) The Attorney General
For the State of Georgia
Office of the Attorney General
State of Georgia
Atlanta, Georgia

This 27 day of January 1989

Pearl L. Henry

Pearl L. Henry

Attorney for Petitioner

Frederick R. Jackson

Frederick R. Jackson

Attorney for Petitioner

IN THE SUPREME COURT OF THE

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For the State of Georgia
Office of the Attorney General
State of Georgia
Atlanta, Georgia

This 16th day of February 1989

Pearl L. Henry

Pearl L. Henry

Attorney for Petitioner

Frederick R.J. Jackson

Frederick R.J. Jackson

Attorney for Petitioner